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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE MONTREAL TRUST COMPANY, as Executor of the Estate of Isidor J. Klein, Deceased,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, The Montreal Trust Company, as Executor of the Estate of Isidor J. Klein, Deceased, prays that this Court grant rehearing of its order of April 25, 1966, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled case, as prayed for in the petition filed March 8, 1966 herein.

Reasons for Granting Rehearing and for Issuing the Writ

There are substantial grounds in support of the petition for writ of certiorari now available to the petitioner which were not previously available and have not pre-

viously been presented to this Court. These grounds are that:

1. A recent decision of the Court of Appeals of the State of New York, made after the United States Court of Appeals for the Second Circuit had announced its decision in this case, has created an irreconcilable conflict and an unresolved inconsistency between the interpretation by the highest court of the State of New York, concerning a New York statute, and the interpretation of that same New York statute by the United States Court of Appeals for the Second Circuit. The decision by the New York Court of Appeals had not been published at the time of the filing of the petition for a writ of certiorari and was then unknown to petitioner.

2. The New York statute, on which these inconsistent decisions by the highest New York court and by the highest federal court sitting within New York are based, is either (a) patently ambiguous since the decisions concerning it of the two high courts, one federal and one state, differ; or (b) if the law be not ambiguous, then interpretation by the United States Court of Appeals in this case must necessarily be incorrect because,

3. The interpretation given by the United States Court of Appeals for the Second Circuit would be an unconstitutional application in accordance with the interpretation of this New York law by the highest court of the State of New York. The highest court of a state is the proper court of last resort for interpretation of the meaning of a statute of that state.

A copy of the decision of the United States Court of Appeals for the Second Circuit, including both majority and minority opinions, was annexed as Appendix A to the

petition for certiorari filed in this Court. The unanimous decision of the New York Court of Appeals, *Kramer* v. *Vogl*, 17 N. Y. 2d 27 (1966), which petitioner contends is inconsistent therewith, is set forth as an Appendix hereto.[1]

This recent decision by the Court of Appeals of the State of New York has clarified the meaning and indicated the proper application of Section 302 of the New York Civil Practice Law and Rules (hereafter "Section 302"). The interpretation of this statute by the New York Court of Appeals raises additional questions which are proper for review as to the interpretation of this same New York statute by the United States Court of Appeals for the Second Circuit. The decision by the New York state court also sharpens the questions previously presented in the petition for writ of certiorari.

Comparison of the Interpretation and Application of Section 302 by the Court of Appeals of the State of New York (*Kramer* v. *Vogl*) and by the Divided United States Court of Appeals, Below

In this comparison the following must be noted: (a) similarities and dissimilarities of each case; (b) the issue before the court in each case; (c) interpretation of the statute by each court; and (d) the basis on which the federal court found jurisdiction and the basis on which the New York court found it had no jurisdiction.

In *Kramer* v. *Vogl* the putative defendants were non-residents who had shipped goods into the United States for sale; in the present case the decedent Klein was an

1. The decision of the lower court in *Kramer* v. *Vogl* was cited in the petition for certiorari (Pet. 6), and it was noted that leave to appeal had been granted.

officer of a company or companies which had similar, but no greater contacts with New York. In each case, the persons alleged to have incurred liability, acting outside of the United States, granted distributorships of products to firms within the United States. The New York Court of Appeals found that this did not constitute the transaction of business in New York by the Vogls, by agents or otherwise, so as to subject them to "long-arm" jurisdiction. The complaint in *Kramer* v. *Vogl* was that because the non-resident and putative defendants breached an exclusive sales contract with the appointed distributor, by selling their goods in the United States to persons other than the plaintiff, the Vogls had assumed a liability in fraud. In the present case, the alleged liability of the decedent I. J. Klein is for income tax said to be owing by reason of his alleged constructive receipt in Canada of income derived from sales of his employers' products in the United States.

In each of the two cases, one in the State court and the other in the federal court, the issue was the same: Did the non-residents transact business within the state so as to warrant application of Section 302? There was no other "contact" with New York, or with any other part of the United States, in either case except through the respective treatment of the distributorships created in both cases by contracts made outside of the United States. The value of the distributorship was lessened in *Kramer* v. *Vogl* by making sales to other United States businesses; in the present case, by allegedly including relatives of the non-resident as beneficiaries of the distributorships.

In the case decided by the Court of Appeals of the State of New York, the court sustained the findings of the lower courts that the non-resident had not transacted busi-

ness in New York and declined jurisdiction. In the case before the United States Court of Appeals for the Second Circuit, on inference, but on inference only, the court reversed the finding of fact of the district court that the non-resident had not transacted business by "agents" or otherwise.

It is now necessary to compare the reasoning of the courts in both cases and here it is well insofar as possible to permit each court to speak for itself.

The Court of Appeals of the State of New York.

> "Chief Judge Desmond. This is another case where the New York courts under CPLR 302 (subd.[a]) are asked to exercise personal jurisdiction over a nondomiciliary on the theory that the cause of action sued upon has arisen from transaction of 'any business within the state' or has arisen from the commission of a 'tortious act within the state'. In this instance both courts below held against jurisdiction and so dismissed the first cause of action.
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> "* * * we have given restrictive meaning to the requirement that there be a showing of a tortious act committed in this State and have made it clear that the statutory phrase is not synonymous with "commits a tortious act *without* the state which causes injury within the state." * * * Here, in common sense and reality, everything defendants Vogl did was done in Europe.
>
> "Turning to paragraph 1 of subdivision (a) of 302, we must decide whether there is an adequate showing here of a cause of action arising from the transaction by defendants Vogl of any business in this State. * * * The issue boils down to whether the phrase 'transacts any business within the state' covers the situation of a nonresident who never

comes into New York State but who sells and sends goods into the State pursuant to an order sent from within the State. * * *"

"Despite the comparative liberality with which we have construed the first paragraph of subdivision (a) of 302 we do not think that the facts displayed here show the case within that paragraph. The cause of action here sued upon cannot be said to have arisen out of any transaction of business in the State. We need not now decide whether it would be unconstitutional to provide by statute that this State could exercise jurisdiction over any outsider who ships goods into this State. * * *" *Kramer* v. *Vogl,* 17 N.Y. 2d 27 at 29, 31 and 32.

The United States Court of Appeals for the Second Circuit; The Majority and Minority Opinons.

The majority said:

"* * * we proceed to determine if the activities conducted by Klein's personal agents constitute the transaction of business within this state. In this regard, we note that the execution of a contract, such as the Schutz-Sager agreement in New York is considered by the New York Courts a vital contact with this state. Thus, in *Patrick Ellam, Inc.* v. *Nieves,* 41 Misc. 2d 186 (1963), the Supreme Court, Westchester County, decided that the *making of a contract in New York* to transport a vessel from New York City to St. Thomas *was sufficient to give the court jurisdiction* over a breach of that contract. For a similar result by the Supreme Court, New York County, see *Iroquois Gas Corp.* v. *Collins,* 42 Misc. 2d 632 (1964)." (Pet. 21) (Emphasis added.)

Two obvious errors of the majority opinion are encompassed within this quoted paragraph.

First, the proposition for which the New York cases were cited is wholly irrelevant since here, as in *Kramer* v. *Vogl,* whatever contracts are alleged to have been entered by the putative defendants were entered outside the United States.

The second error lies in the efforts of the majority to bridge the gap between the assertion by the plaintiff that Klein was doing business in the United States and the facts of the case, by assuming that Klein had some sort of agency in the United States which did business for him. But what was this business? If it was the shipping of goods into New York, or the receipt by a resident of those goods for sale, this is not the transaction of business as the New York Court of Appeals has held is required to invoke Section 302. If it was diverting funds which should have been paid to the company of which he was a managing director, fraud might be implied. But this would in any event be fraud on the Canadian employer company, and the Court of Appeals of the State of New York has said that acts outside of the United States amounting to a commission of fraud—even if it be a fraud resulting in damage within the United States—is not a contact in New York within the jurisdiction of the court under the long-arm statute.

The Court of Appeals of the State of New York, by its opinion herein cited, has done much to clarify the interpretation and constitutional application of that statute. It is respectfully suggested that a decision of the Supreme Court of the United States is now even more urgently needed similarly to define the jurisdiction of the federal courts and to avoid conflict with the courts of the state in which they sit. Otherwise the issue will undoubtedly come back again and again to plague us.

The decision of the majority below is in conflict with *Kramer* v. *Vogl* not only in the substantive interpretation of Section 302, but in its procedural application as well. In *Kramer* v. *Vogl*, the New York courts followed the customary and proper procedure of determining the question of jurisdiction on motion, prior to trial on the merits. In conflict with this rule, the majority below seeks to introduce a new theory of jurisdiction; that of assuming jurisdiction on plaintiff's allegations and permitting the plaintiff the opportunity later to prove that jurisdiction was not improvidently assumed.

> "Our conclusion that the government established at least threshold jurisdiction at the preliminary hearing does not relieve it at the trial of the case-in-chief from proving the facts upon which jurisdiction is based by a preponderance of the evidence. Cf. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178 (1936)." (Pet. 20)[2]

The petitioner here points out that the long-arm statute permits a plaintiff (if the statute is properly used) to call a non-resident from the ends of the earth to appear in state or federal court in New York. The right to exercise this great power extraterritorially should be used with utmost discretion; it is an abuse to exercise it on inference or implication or on assurance by plaintiff that

2. Although the statute involved in *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, differed from that now before this court, the question whether jurisdiction had been acquired was the same. *McNutt* wholly supports the petitioner here. The Court there said: "The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." 298 U. S. at 189.

the basis will be proved later. Such a use would be unconstitutional.

The recent decision of the Court of Appeals of the State of New York differing so markedly in interpretation and application of a New York statute, in the opinion of the petitioner, makes it of the utmost importance and urgency that the Supreme Court of the United States grant the writ of certiorari and define the conditions under which jurisdiction may be acquired through the long-arm statute of New York, not only to avoid utmost confusion in the courts, but possible international complications as well.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

May 1966

Respectfully submitted,

HENRY HARFIELD
JOHN E. HOFFMAN, JR.
Attorneys for Petitioner, The Montreal Trust Company.

SHEARMAN & STERLING,
Of Counsel.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

May 1966

HENRY HARFIELD
Attorney for Petitioner, The Montreal Trust Company

APPENDIX

Kramer v. *Vogl*, 17 N. Y. 2d 27 (1966)

Chief Judge DESMOND. This is another case where the New York courts under CPLR 302 (subd. [a]) are asked to exercise personal jurisdiction over a nondomiciliary on the theory that the cause of action sued upon has arisen from transaction of "any business within the state" or has arisen from the commission of a "tortious act within the state". In this instance both courts below held against jurisdiction and so dismissed the first cause of action (Kramer against Vogl). We granted leave to appeal.

Plaintiff is a resident of this State and does business in New York City as a dealer in imported leather. The action is for fraud. The summons and complaint were served personally on defendants-respondents in Austria where they live and carry on the business of producing and marketing "Vogl" leathers. Generally it is the theory of the complaint that plaintiff suffered damage because of the willful fraud and deceit of defendants Vogl in that the latter, when appointing plaintiff as defendants' exclusive United States agent to import and distribute defendants' leather products, made intentionally false representations to plaintiff that Vogl leather would not be supplied to anyone else in this country in competition with plaintiff. Plaintiff charges that to induce him to purchase Vogl leathers and to promote their sale in the United States to plaintiff's customers the Vogl defendants falsely promised not to sell these products to anyone else in the United States (except one named customer) and that relying on these promises plaintiff pur-

chased from defendants and imported to the United States large quantities of Vogl leathers and spent such time and effort in advertising and promoting the sale of these wares. From August, 1960 to March, 1962, plaintiff avers, this arrangement continued and in the latter month the arrangement was renewed with a repetition by defendants of the same warranties as to sole representation. However, so plaintiff alleges, defendants never intended to keep these promises and in fact at the time of the renewal in March, 1962 had already arranged to sell and had sold and continued to sell their wares to the defendants Chilewich and their associated companies, all of this causing great damage to plaintiff. On this appeal we are not concerned with the complaint's second cause of action which runs against the Chilewich defendants only.

All shipments from Vogl to plaintiff were, as agreed, f. o. b. European ports. It is the position of the Vogls that not only did they never do any business in New York but that plaintiff was never given the sole United States agency, that even if plaintiff was appointed sole American agent the one-year contract was never renewed, and, also, that the "tortious acts" of defendants Vogl, if any, were committed not in New York State but in Austria. It is undisputed that the original contract between plaintiff and defendants Vogl was arranged at a meeting in Paris in 1959 and that when plaintiff returned to New York defendants from Austria wrote to plaintiff in New York a letter confirming the conversation in which plaintiff had been granted the sole American agency for one year. Plaintiff was not paid by the Vogls on a salary or commission basis but bought the leather and paid for it.

Defendants moved to dismiss the complaint on the ground that the Vogl defendants had never transacted any business in the State of New York and that the court has not acquired personal jurisdiction as to them.

Both courts below wrote brief opinions to the effect that defendants Vogl did not have the "minimum contacts" in New York State necessary for acquisition of personal jurisdiction over them and that any cause of action arising out of the transaction between the parties did not arise from a tortious act within the meaning of subdivision (a) of CPLR 302. One of the Justices at the Appellate Division, concurring, took the position that, while the complaint may be construed to show a tortious act within this State in the sense of damage done here, that nonetheless any activity of the Vogl defendants within this State was not sufficient to satisfy the constitutional requirements of due process.

We first look to see whether there is a sufficient showing here under paragraph 2 of subdivision (a) of 302—that is, whether the papers show the commission by defendants Vogl of a tortious act within this State. The argument on behalf of plaintiff is that the last act of the fraud was committed in New York when Vogl sent merchandise to Chilewich, also that the damage to plaintiff was done in New York. A difficulty is, however, that in *Feathers* v. *McLucas* and *Singer* v. *Walker* (15 N Y 2d 443) we have given restrictive meaning to the requirement that there be a showing of a tortious act committed in this State and have made it clear that the statutory phrase is not synonymous with "commits a tortious act *without* the state which causes injury within the state" (*supra,* p. 460). The plain meaning of the *Feathers* and *Singer* decisions (*supra*) is that jurisdiction under 302 (subd. [a], par. 2)

requires that a defendant's act of omission occur within the State. Here, in common sense and reality, everything defendants Vogl did was done in Europe.

Turning to paragraph 1 of subdivision (a) of 302, we must decide whether there is an adequate showing here of a cause of action arising from the transaction by defendants Vogl of any business in this State. On this we can refer to a number of decisions of this court (see *Singer* v. *Walker,* 15 N Y 2d 443, *supra; Lewin* v. *Bock Laundry Mach. Co.,* 16 N Y 2d 1070, and *Johnson* v. *Equitable Life Assur. Soc. of U. S.,* 16 N Y 2d 1067). The issue boils down to whether the phrase "transacts any business within the state" covers the situation of a nonresident who never comes into New York State but who sells and sends goods into the State pursuant to an order sent from within the State. We do not have here, as we had in *Singer, Lewin* and *Johnson* (*supra*), a nonresident defendant who has one or more local salesmen in this State or who solicits business in this State by means of catalogue, advertisements or other promotional material circulated here. All we know is that these defendants in Austria made arrangements to sell merchandise f. o. b. to the local distributor. Defendants themselves carried on no sales, promotion or advertising activities in this State. It is alleged in the papers on this dismissal motion, and not denied, that in 1961 out of total sales of about several million dollars the Vogl sales to plaintiff Kramer amounted to about $125,000 or less than 2% of the total, and that in 1962 Vogl's total sales were about $6,600,000 of which Kramer's purchases were a little more than 1%. Nowhere does it appear how much of the Vogl leather bought by plaintiff was resold to New York State customers or used in New York.

Despite the comparative liberality with which we have construed the first paragraph of subdivision (a) of 302 we do not think that the facts displayed here show the case within that paragraph. The cause of action here sued upon cannot be said to have arisen out of any transaction of business in the State. We need not now decide whether it would be unconstitutional to provide by statute that this State could exercise jurisdiction over any outsider who ships goods into this State (for a sampling of the cases, see *McGee* v. *International Life Ins. Co.*, 355 U. S. 220; *Howes Co.* v. *W. P. Milling Co.*, 277 P. 2d 655 [Okla.]; *WSAZ, Inc.* v. *Lyons*, 254 F. 2d 242; *Insull* v. *New York World-Tel. Corp.*, 273 F. 2d 166; *Berlemann* v. *Superior Distr. Co.*, 17 Ill. App. 2d 522; *Grobark* v. *Addo Mach. Co.*, 16 Ill. 2d 426; *Beck* v. *Spindler*, 256 Minn. 543; *Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F. 2d 502; *Putnam* v. *Triangle Pubs.*, 245 N. C. 432).

The order appealed from should be affirmed, with costs.

Judges Fuld, Van Voorhis, Burke, Scileppi, Bergan and Keating concur.

Order affirmed.